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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sutter)

YUBA CYPRESS HOUSING PARTNERS, LTD., Plaintiff, v. AREA DEVELOPERS et al. Defendants.	C043510 (Super. Ct. No. CVCS92-51330)
JAMES R. SMITH, Plaintiff and Appellant, v. AREA DEVELOPERS et al. Defendants and Respondents.	(Super. Ct. No. CVCS94-0568)

Plaintiff James R. Smith appeals from a post-judgment order awarding him attorney fees against defendants Area Developers,

Kelly Bumpus, and D. Bruce Porter in connection with two earlier appeals. He contends "the trial court erred when it reduced [his] request for attorney's fees [in the second appeal] in the lodestar amount of $18,717.50 to $7,500.00 without explanation." Claiming the appeal is frivolous, defendants request an award of sanctions. We shall affirm the post-judgment order but deny the request for sanctions.

FACTUAL AND PROCEDURAL BACKGROUND

Smith and Yuba Cypress Housing Partners, Ltd., filed separate actions against the defendants for fraud and breach of contract involving options to purchase lots in a parcel to be subdivided by defendants in Yuba City. (Yuba Cypress Housing Partners, Ltd., is not a party to this appeal.) The two actions were consolidated and tried to the superior court, which found in favor of defendants and ruled that plaintiffs were not entitled to the protections of the Subdivided Lands Act (the Act) (Bus. & Prof. Code, § 11000 et seq.). (*Yuba Cypress Housing Partners, Ltd. v. Area Developers* (May 28, 1998, C024819) [nonpub. opn.].) On appeal, this court held that the Act applied to the transactions and that plaintiff Smith could disavow the contract and reclaim the monies he paid to defendants. (*Ibid.*) The trial court was directed to calculate the award to which Smith was entitled and to enter judgment in his favor. (*Ibid.*) Defendants were ordered to reimburse Smith for his costs on appeal. (*Ibid.*)

On remand, Smith sought attorney fees as the prevailing party under an attorney fee clause in the real estate contract. (Civ. Code, § 1717.) The trial court taxed a portion of the fees which

Smith incurred at trial and denied attorney fees on appeal on the ground that his request was untimely. Smith filed a second appeal challenging that ruling. Defendants cross-appealed, arguing Smith was not entitled to recover attorney fees pursuant to Civil Code section 1717 because the contract was illegal under the Subdivided Lands Act. (*Yuba Cypress Housing Partners, Ltd. v. Area Developers* (2002) 98 Cal.App.4th 1077, 1080.) This court affirmed the apportionment of attorney fees for work at trial and rejected defendants' claim that the contract was illegal for purposes of awarding attorney fees (*id.* at pp. 1080-1081), but concluded that the request for attorney fees in the first appeal was timely. (*Id.* at pp. 1081, 1083-1086.) Accordingly, the judgment was reversed to the extent it denied Smith an award of attorney fees incurred in the first appeal. (*Id.* at p. 1087.) The trial court was directed to calculate the reasonable amount of attorney fees that Smith incurred, and defendant Area Developers was ordered to reimburse Smith for the costs he incurred on the second appeal. (*Ibid.*)

On remand, the trial court reviewed the entire record and made the following award to Smith: (1) $11,500 in attorney fees against defendants in the first appeal; (2) $1,239.50 in costs against defendants in the first appeal; and (3) $7,500 in attorney fees against the defendants in the second appeal.

Smith filed a request for a statement of decision under Code of Civil Procedure section 632, asking the trial court to clarify "how it calculated the attorneys fees." He also filed a separate "Motion to Clarify Order Awarding Fees" which questioned the

reduction of fees by one third in the first appeal. At oral argument in the trial court, Smith limited his request for clarification to the manner in which the court determined attorney fees incurred in the second appeal. The court ruled that it lacked jurisdiction to revisit the attorney fee issue based on the authorities presented and that, even if it did have jurisdiction, it "would exercise [its] discretion and not do so." This third appeal ensued.

DISCUSSION

I

Smith states that the "sole issue on this appeal is whether the trial court erred when it reduced [his] request for attorney's fees [in the second appeal] in the lodestar amount of $18,717.50 to $7,500.00 without explanation." As he did in the trial court, he cites *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (hereafter *Dunk*) for the proposition that the court's order had to show how the court calculated the attorney fee award using the lodestar method. Smith reads too much into the decision in *Dunk*.

The trial court in *Dunk* awarded attorney fees based upon a percentage of a "common fund" recovery. (*Dunk, supra,* 48 Cal.App.4th at p. 1809.) The Court of Appeal reversed the fee award because (1) authorities "have cast doubt on the use of the percentage method to determine attorney fees in California class actions," (2) even if the method was permissible, the type of settlement in *Dunk* did not "lend[] itself to the common fund approach," and (3) the award could not be upheld using the lodestar method since (a) the trial court did not use that method, (b) "the

record [did] not reflect the presentation of information sufficient to properly apply the lodestar approach," and (c) the Court of Appeal was "unable to determine how the trial court calculated the fees . . . ." (*Id.* at pp. 1809, 1810.)

Apparently seizing on the language we have quoted at the end of the preceding paragraph, Smith interprets the decision in *Dunk* to require a trial court to show how it calculated attorney fees using the lodestar method. Not so. Indeed, *Dunk* observed that "[t]o withstand scrutiny on appeal when [the lodestar] method is used, the record need only show the court awarded fees using that approach." (*Dunk, supra,* 48 Cal.App.4th at p. 1810.)

It has long been the law in California that a trial court is not required to provide a formal statement of decision to explain how it calculated an award of attorney fees. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1294; *Rebney v. Wells Fargo Bank* (1991) 232 Cal.App.3d 1344, 1348-1349; *Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 625.) "[T]he record need only show that attorney fees were awarded according to the 'lodestar' or 'touchstone' approach." (*Rebney v. Wells Fargo Bank, supra,* 232 Cal.App.3d at p. 1349.) The trial court is "not required to explain which of counsel's hours were disallowed, or how or whether any hours were apportioned." (*Ibid.*)

Nevertheless, Smith argues the award must be reversed because the court's order "does not even indicate whether the requisite lodestar method was used." But there was no need for the order to state the obvious, that the court used the lodestar method to calculate the attorney fee award. Smith's request for fees of

$18,717.50 was calculated using the lodestar method, i.e., the hours worked by his attorneys multiplied by the hourly rates for their services. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) In arguing Smith was entitled to only $6,000 in attorney fees, defendants also used the lodestar method, adjusted based upon factors specific to this case, i.e., "'the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case.' (*Melnyk v. Robledo[, supra],* 64 Cal.App.3d [at pp.] 623-624.)" (See also *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132; *PLCM Group, Inc. v. Drexler, supra,* 22 Cal.4th at p. 1096.) We are satisfied the record demonstrates that the trial court used the lodestar method.

The trial court is entitled to great deference on the amount of attorney fees to be awarded. "The 'experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.'" (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.)

In this regard, Smith's sole argument is "[t]o the extent that the drastic reduction to [his] request for attorney's fees was based on the contentions made by [defendant] Area Developers [in its opposition to the request], . . . such contentions cannot form the basis of the 'reduction.' If the court relied on such contentions, such as the contention that [Smith's] counsel should

not have prepared for oral argument, this reliance constituted an abuse of discretion." Smith fails to support this argument with any citations to the record, any citations to legal authority, or any meaningful analysis. Consequently, we deem the argument to be waived. (*Clark v. Burleigh* (1992) 4 Cal.4th 474, 481-482; *Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 ["Where a point is merely asserted by appellant's counsel without any argument of or authority for the proposition, it is deemed to be without foundation and requires no discussion by the reviewing court"].)

II

Defendants argue that Smith has prosecuted a frivolous appeal and should be ordered to pay sanctions of at least $2,500. (See Code Civ. Proc., § 907; *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 (*Flaherty*).) While this is a close call, we cannot say that Smith's "appeal as a whole is so utterly devoid of potential merit as to justify sanctions." (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1112.) Indeed, an argument could be made that the nature of the second appeal, which resulted in a published opinion favorable to Smith on two issues, required a degree of attention and skill that would justify a higher attorney fee award. Mindful of the California Supreme Court's admonition that (1) "'[f]ree access to the courts is an important and valuable aspect of an effective system of jurisprudence, and a party possessing a colorable claim must be allowed to assert it without fear of suffering a penalty more severe than that typically imposed on defeated parties'" (*Flaherty, supra,* 31 Cal.3d at p. 648), and (2) counsel and their clients have a right to present issues "even

if it is extremely unlikely that they will win on appeal" (*id.* at p. 650), we reject the request for sanctions.

DISPOSITION

The order is affirmed. The motion for sanctions is denied. Smith shall reimburse defendants for their costs on appeal. (Cal. Rules of Court, rule 27(a).)

SCOTLAND, P.J.

We concur:

SIMS, J.

BUTZ, J.